

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of SHEILA D. SCOTT and DEPARTMENT OF THE TREASURY,
INTERNAL REVENUE SERVICE, Bensalem, PA

*Docket No. 03-1642; Submitted on the Record;
Issued November 21, 2003*

DECISION and ORDER

Before COLLEEN DUFFY KIKO, DAVID S. GERSON,
WILLIE T.C. THOMAS

The issue is whether the Office of Workers' Compensation Programs properly denied appellant's request for reconsideration on the grounds that it was untimely filed and failed to demonstrate clear evidence of error.

The Office accepted appellant's claim for right hand and wrist sprain, left ankle sprain and tear of the triangular fibrocartilage complex (TFC) ligament right wrist, which was surgically repaired. Appellant received compensation for lost time from work and returned to work on July 27, 1998. She stopped working on May 24, 1999. In an undated CA-2 form received by the Office on June 30, 1999 appellant filed a claim for a recurrence of disability, due to the August 8, 1996 employment injury. She left the date of the recurrence blank and indicated that she stopped working on May 24, 1999. By decision dated October 8, 1999, the Office denied the claim, stating that the evidence of record failed to establish that the claimed recurrence was causally related to the August 8, 1996 employment injury.

On September 24, 2001 appellant filed a CA-2 form for a recurrence of disability, due to the August 8, 1996 employment injury, commencing early April 1999 and indicated that she stopped working on May 24, 1999. Appellant stated that in her second attempt to work from February to May 24, 1999, the pain and limitations from her original injury prevented her from working. Appellant stated that the recurrence occurred as a result of the job's repetitive physical requirements including pushing/pulling, lifting carrying, reaching, filing and writing. By letter dated October 26, 2001, the Office informed appellant that her CA-2 form for a notice of recurrence on May 24, 1999 had been previously addressed in the October 8, 1999 decision and if she did not agree with the decision, she should pursue one of her appeal rights.

By letter dated January 27, 2003, appellant requested reconsideration of the Office's decision and submitted additional evidence consisting of medical notes and reports from appellant's treating physician, Dr. Paul H. Steinfield, a Board-certified orthopedic surgeon, dated April 30, May 11, 14 and 24, June 9 and August 11, 1999 and a copy of the September 24, 2001, claim for a recurrence of disability. In the April 30, 1999 report, Dr. Steinfield diagnosed, *inter*

alia, cervical radiculopathy, right carpal tunnel syndrome and left lower wrist ganglion. He stated that appellant's condition appeared to be an exacerbation of a previously diagnosed condition that was work related. On May 11, 1999 Dr. Steinfield stated that appellant had cervical radiculopathy and was unable to return to work. In the May 14, 1999 report, Dr. Steinfield performed a physical examination, recommended another magnetic resonance imaging (MRI) scan and stated that appellant's symptoms of cervical spondylosis and radiculopathy were work related. He stated that appellant could continue working but might have difficulty working in the future.

In the May 24, 1999 report, Dr. Steinfield stated that appellant was unchanged upon examination, that she had cervical radiculopathy, which dated back to the August 1996, work injury and he told her to stop working for the next two weeks. In the June 9, 1999 report, Dr. Steinfield stated that there was no change on physical examination, the MRI scan showed evidence of a persistent and severe cervical radiculopathy, which was work related. He stated that appellant might have an underlying disc herniation and remained out of work. In a report dated June 9, 1999, Dr. Steinfield found no change on physical examination but stated that the MRI scan showed evidence of a persistent and severe cervical radiculopathy, which was work related. He stated that appellant might have an underlying disc herniation. In his August 11, 1999 report, Dr. Steinfield reviewed an MRI scan dated June 30, 1999 and stated that the study showed neural foraminal narrowing at two levels, which appeared to be at C4-5. He opined that appellant had persistent cervical radiculopathy with evidence for neural steroid injections. Dr. Steinfield stated that although appellant first complained of wrist pain, it was "clear" that she had cervical radiculopathy and it was "clear" that appellant's symptoms were work related. He opined that appellant was unable to work.

By decision dated March 17, 2003, the Office denied appellant's request for reconsideration, stating that appellant's request for reconsideration filed on January 27, 2003 more than a year after the Office's October 8, 1999 decision denying appellant's claim for a recurrence of disability, was untimely and did not demonstrate clear evidence of error.

The Board finds that the Office properly denied appellant's request for reconsideration on the grounds that it was untimely filed and failed to demonstrate clear evidence of error.

The Board's jurisdiction to consider and decide appeals from a final decision of the Office extends only to those final decisions issued within one year prior to the filing of the appeal.¹ As appellant filed the appeal with the Board on June 18, 2002, the only decision before the Board is the Office's March 17, 2003 decision denying appellant's request for reconsideration.

The Office, through its regulations, has imposed limitations on the exercise of its discretionary authority under section 8128(a).² The Office will not review a decision denying or terminating benefits unless the application for review is filed within one year of the date of that

¹ *Oel Noel Lovell*, 42 ECAB 537 (1991); 20 C.F.R. §§ 501.2(c), 501.3(d)(2).

² 5 U.S.C. § 8128(a).

decision.³ The Office will consider an untimely application for reconsideration only if the application demonstrates clear evidence of error by the Office in its most recent merit decision. The application must establish, on its face, that such decision was erroneous.⁴

Appellant made her January 27, 2003 request for reconsideration more than one year after the Office's October 8, 1999 decision, the most recent decision on the merits of her claim. Her request is, therefore, untimely. The question for determination is whether the reconsideration request shows clear evidence of error.

The Office, through its regulations, has imposed limitations on the exercise of its discretionary authority under section 8128(a).⁵ The Office will not review a decision denying or terminating benefits unless the application for review is filed within one year of the date of that decision.⁶ The Office will consider an untimely application for reconsideration only if the application demonstrates clear evidence of error by the Office in its most recent merit decision. The application must establish, on its face, that such decision was erroneous.⁷

To show clear evidence of error, a claimant must submit evidence relevant to the issue, which was decided by the Office.⁸ The evidence must be positive, precise and explicit and must be manifest on its face that the Office committed an error.⁹ Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.¹⁰ It is not enough merely to show that the evidence could be construed to as to produce a contrary conclusion.¹¹ This entails a limited review by the Office of how the evidence submitted with the reconsideration request bears on the evidence previously of record and whether the new evidence demonstrates clear error on the part of the Office.¹² To show clear evidence of error, the evidence submitted must not only be of sufficient probative value to create a conflict in the medical opinion or establish a clear procedural error, but must be of sufficient probative value to *prima facie* shift the weight of the evidence in favor of the claimant and raise a substantial question as to the correctness of the Office's decision.¹³ The Board makes an

³ 20 C.F.R. § 10.607(a); *see also Gregory Griffin*, 41 ECAB 186 (1989), *petition for recon. denied*, 41 ECAB 458 (1990).

⁴ 20 C.F.R. § 10.607(b); *see Thankamma Mathews*, 44 ECAB 765 (1993); *Jesus D. Sanchez*, 41 ECAB 964 (1990).

⁵ 5 U.S.C. § 8128(a).

⁶ 20 C.F.R. § 10.607(a); *see also Gregory Griffin*, *supra* note 3.

⁷ 20 C.F.R. § 10.607(b); *see Thankamma Mathews*, *supra* note 4; *Jesus D. Sanchez*, *supra* note 4.

⁸ *Dean D. Beets*, 43 ECAB 1153 (1992); *Willie J. Hamilton*, Docket No. 00-1468 (issued June 5, 2001).

⁹ *Leona N. Travis*, 43 ECAB 227 (1991); *Willie J. Hamilton*, *supra* note 8.

¹⁰ *See Jesus D. Sanchez*, *supra* note 4.

¹¹ *Leona N. Travis*, *supra* note 9.

¹² *Willie J. Hamilton*, *supra* note 8.

¹³ *George C. Vernon*, 54 ECAB ____ (Docket No. 02-1954, issued January 6, 2003).

independent determination as to whether a claimant has submitted clear evidence of error on the part of the Office such that the Office abused its discretion in denying a merit review in the face of such evidence.¹⁴

In this case, the reports from Dr. Steinfield dated April 30, May 11, 14 and 24, June 9 and August 11, 1999, do not identify any error in the Office's decision. In his April 30, 1999 report, he diagnosed, in part, cervical radiculopathy, right carpal tunnel syndrome and left lower wrist ganglion and stated that appellant's condition appeared to be an exacerbation of a previously diagnosed condition, which was work related. His opinion is not relevant, however, to establishing a recurrence of disability as an exacerbation of a previous condition constitutes a new injury.¹⁵ Further, Dr. Steinfield did not explain how the exacerbation occurred. Dr. Steinfield's May 11, 1999 disability, note contained the diagnosis of cervical radiculopathy and stated that appellant was unable to work. He did not address causation and, therefore, has not shown error in the Office's decision. In his reports dated May 14 and 24, June 9 and August 11, 1999, Dr. Steinfield consistently stated that appellant's cervical radiculopathy was work related but provided no medical rationale explaining how appellant's condition was work related or how it was related to the accepted injury of right hand and wrist sprain and TFC. His reports, therefore, do not show that the Office erred in finding that appellant failed to establish that she sustained a recurrence of disability commencing early April or May 24, 1999. The evidence appellant submitted in support of her request for reconsideration does not raise a substantial question as to the correctness of the Office's March 17, 2003 decision and, therefore, fails to demonstrate clear evidence of error.

The March 17, 2003 decision of the Office of Workers' Compensation Programs is hereby affirmed.

Dated, Washington, DC
November 21, 2003

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

¹⁴ *Pasquale C. D'Arco*, 54 ECAB ____ (Docket No. 02-1913, issued May 12, 2003).

¹⁵ See 20 C.F.R. § 10.104.